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EX PARTE OR LATE FILED

November 9, 1999

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
The Portals
445 Twelfth Street, S.W.
12th Street Lobby, TW-A325
Washington, D.C. 20554

Re: CC Docket No. 98-184; Ex Parte Filing

Dear Ms. Salas:

On Monday, November 8, 1999, GTE and Bell Atlantic representatives met with Christopher Wright, Jeffrey Lanning, Paula Siberthau, and Debra Weiner from the Office of General Counsel, and Larry Strickling, William Bailey, and Henry Thaggert, and from the Common Carrier Bureau. Attending the meeting were William P. Barr from GTE, Edward Young and Michael Glover from Bell Atlantic, Michael Senkowski from Wiley, Rein & Fielding, and Steven Bradbury from Kirkland & Ellis.

The purpose of the meeting was to discuss the status of the pending Bell Atlantic-GTE merger application. In particular, the parties discussed the Commission's trust precedent and the use of a trust vehicle to address the long distance issues associated with the merger. The points and issues discussed at the meeting are set out in further detail in the attached document.

In accordance with Section 1.1206(b)(2) of the Commission's rules, an original and one copy of this notice are being submitted to the Secretary. Please contact the undersigned counsel for GTE if you have any questions.

Sincerely,

Nancy J. Victory

Nancy J. Victory

No. of Copies rec'd 0+1
List ABCDE

cc: Christopher Wright
Larry Strickling
Paula Silberthau
Jeffrey Lanning
William Bailey
Debra Weiner
Henry Thaggert
Michelle Carey
Kathryn Brown
Helgi Walker
Linda Kinney
Kyle Dixon
Sarah Witesell

COMMISSION PRECEDENTS SUPPORT A TRUST SOLUTION

- The Commission repeatedly has permitted the use of trusts to break the chain of ownership and control, including situations where violations of court orders and the Telecommunications Act would have occurred without a trust.

  - In precedent similar to the situation at hand, the Commission has made clear that assets held in trust are not owned or controlled by an acquiring company. In *In re Communications Indus., Inc., James F. Rill, Trustee, and Pacific Telesis Group*, Mimeo No. 0770, slip op. (Nov. 8, 1985), Pacific Telesis proposed to place Communications Industries ("CI"), a mobile company, in a trust to avoid potential violation of the MFJ line of business restrictions. *Id.* ¶ 5. In approving the formation of the trust, and thereby allowing the transaction to close while regulatory approvals were pending, the Commission stated: "*We find that the trust mechanism is an acceptable tool to insulate CI from the exercise of legal ownership or control by Pacific Telesis.*" *Id.* ¶ 15 (emphasis added).

  - Likewise, in *In re Tel-Optik, Ltd.*, 1 FCC Rcd. 742 (1986), the Commission authorized Tel-Optik, a company operating transatlantic fiber cables, to be placed in a trust while NYNEX sought a waiver of the MFJ to provide limited interexchange services from the District Court of the District of Columbia. *Id.* ¶ 10. *See also In re Infinity Broadcasting Corp.*, 12 FCC Rcd. 5012, at ¶¶ 51-57 (1996) (approving application for trust to facilitate merged entity's compliance with local radio ownership restrictions adopted in the Telecommunications Act of 1996 and incorporated into FCC rules); *SFX Broadcasting*, 13 FCC Rcd. 12366, at ¶ 17 (1998) ("The ownership interests of beneficiaries will not be attributed to them if they are sufficiently insulated so as to prevent their exercise of control or influence over them."); *In re Twentieth Holdings Corp.*, 4 FCC Rcd. 4052, at ¶ 5 (1989) ("Under our Attribution criteria, the ownership interests of trustors or beneficiaries will not be attributed to them if they are sufficiently insulated so as to prevent their exercise of control or influence over the trustee.").

- Full ownership and control of assets subject to Section 271 would be transferred to an independent trustee. The merged company would not have a right to receive profits from the operations of the businesses transferred into the trust, nor would it receive even the tax benefit of any losses allocable to the provision of services that are barred by Section 271.

  - The merged entity's beneficial interest in the trust would be sufficiently insulated so as to prevent the exercise of control or influence over the trustee. The parties would transfer 100 percent of the equity in the specified assets to the trustee. The merged company would not have use of, or access to, facilities or equipment of the businesses transferred into the trust. Nor would it control day-to-day operations or influence policy decisions. These areas would be solely within the discretion of the trustee, subject to an approved business plan. The trustee, and not the merged company, would appoint any replacement directors. In addition, there would be no interlocking officers or directors for the duration of the trust. Moreover, the merged company would have no role in the employment, supervision, and dismissal of employees. And it would not have the right to receive profits from the operations of the businesses transferred into the trust. Such profits would be retained by the trust or distributed solely at the discretion of the trustee. The merged company would only receive from the trust the tax benefit of losses from the businesses transferred into the trust, and then only those losses derived from the provision of services not subject to the requirements of Section 271.

- The Commission has approved trusts that expressly allow beneficiaries to participate in profits and tax benefits. In *In re Twentieth Holdings Corp.*, 4 FCC Rcd. 4052 (1989), the Commission approved of a trust providing that "revenues in excess of prudent expenses will be considered income and may be remitted periodically" to the beneficiary. *Id.* ¶ 6. Likewise, in *In re Jacor Communications*, 14 FCC Rcd. 6867 (1999), the Commission approved a trust that, among other things, allowed the beneficiary to realize certain tax benefits. *Id.* ¶ 36. In light of these precedents and the fact that the trustee would have exclusive control over the businesses transferred into the trust, the merged company's proposed receipt of the tax losses derived from services that are not in violation of Section 271 would not constitute ownership or control of the trust.

- The Commission has approved the use of trusts for assets to be retained.

  - In *In re Jacor Communications*, 14 FCC Rcd. 6867 (1999), the Commission approved a request by Jacor and Clear Channel Communications for authority to assign radio stations that were not to be divested to "contingent, holding trusts," so that the companies would be able to comply with the Commission's local radio ownership rules if they were unable to complete certain required divestitures by the consummation of their merger. *Id.* ¶¶ 34-37. *See also In re Tel-Optik, Ltd.*, 1 FCC Rcd. 742, at ¶ 10 (1986) (approving retention trust to allow time to gain regulatory waivers); *In re Communications Indus., Inc., James F. Rill, Trustee, and Pacific Telesis Group*, Mimeo No. 0770, slip op., at ¶ 5 (Nov. 8, 1985) (same); *American Radio Systems Corp.*, 13 FCC Rcd. 12430, at ¶¶ 5, 23-24 (1998) (approving retention trust to carry out a divestiture plan for other licenses); *In re Infinity Broadcasting Corp*, 12 FCC Rcd. 5012, at ¶¶ 53-59 (1996) (approving retention trust as a contingency in case the sale of other assets did not go through).

- The trust would be for a limited duration, giving the merged company an *additional* incentive to comply rapidly with Section 271.

  - GTE and Bell Atlantic have proposed that the trust last for only a limited time of five years. It therefore *will not* be a foregone conclusion that the combined company can reintegrate the businesses transferred into the trust.

  - Rather, if the merged company has not complied with Section 271, it will be unable to bring the businesses transferred into the trust back into the fold. Limiting the trust's duration will therefore eliminate any incentive to discriminate in favor of the businesses transferred into the trust. Any such behavior would be examined under a microscope when the Commission passes on the merged company's 271 applications and would be a reason for denying those applications -- a result that would jeopardize the ultimate disposition of the businesses transferred into the trust.

  - On balance, placing specified assets in a trust will spur the combined company to comply with Section 271 *more quickly*, assuring that it does not lose the right to reintegrate a very valuable asset. Approval of the trust therefore promotes, not undermines, "Congress' method of promoting both local and long distance competition by prohibiting BOCs from full participation in the long distance market until they have opened their local markets to competition pursuant to Section 271's competitive checklist." *In re Ameritech Corp.*, 13 FCC Rcd. 21438, at ¶ 30 (1998).

- There are unique reasons why permitting the use of a trust here is strongly in the public interest and would not set a precedent for other situations. The need to place specified assets in a trust is dictated by GTE's unique role in the market for Internet backbone service.

  - The Commission has repeatedly stressed its intention to keep the Internet "competitive, accessible, and devoid of entry barriers." *In re MCI WorldCom*, 13 FCC Rcd. 18025, at ¶ 142. Preserving competition in the market for Internet backbone service is a vital part of this mandate, necessary "to ensure that the dynamism that has characterized the Internet will not be undermined." *Id.* Indeed, as the Commission has noted, if competition in this market deteriorates, there are no "good demand substitutes for ISPs and regional backbone providers to obtain national Internet access." *Id.* ¶ 148.

  - GTE plays a pivotal role in the highly concentrated Internet backbone market. It is one of the top four Internet backbone providers, smaller than MCI WorldCom but larger than Cable & Wireless, which is falling from the top tier. This position must be maintained to keep the Internet backbone market from tipping towards undue concentration, destroying the delicate competitive balance that assures the incentive of all top-tier backbone providers to interconnect on non-discriminatory terms.

- Placing specified assets into a trust will guarantee the continued competitiveness of the market for Internet backbone service. Given this unique justification for using a trust arrangement, the Commission's approval would not set a precedent that could be used in other cases to undermine Section 271.